

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

SUNSHINE PIPING, INC.

and

Case 15-CA-16781

UNITED ASSOCIATION OF
JOURNEYMEN & APPRENTICES OF
THE PLUMBING & PIPEFITTING
INDUSTRY OF THE U.S. & CANADA,
AFL-CIO, LOCAL NUMBER 366

C. R. Rogers, Esq., for the General Counsel.

Tony B. Griffin, Esq. and

Brett P. Ruzzo, Esq. for Respondent.

Greg Boggs, Representative,
for the Charging Party.

DECISION

Statement of the Case

MARGARET G. BRAKEBUSCH, Administrative Law Judge. The original charge in Case 15-CA-16781 was filed on October 14, 2002¹ by United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the U.S. & Canada, AFL-CIO, Local Number 366, (the Union). The Union later filed an amended charge on November 5, 2002, as well as a second amended charge on November 14. A third amended charge was filed by the Union on December 23 and a fourth amended charge was filed on January 28, 2003. Based upon the allegations contained in Case 15-CA-16781, the Regional Director for Region 15 of the National Labor Relations Board (herein the Board), issued a Complaint and Notice of Hearing on January 30, 2003. The complaint alleges that Sunshine Piping, Inc., (Respondent), violated Sections 8(a)(1) of the National Labor Relations Act (the Act), by threatening employees by informing them that Respondent did not want them to be employed by Respondent because they had testified against the Respondent. The complaint further alleges that Respondent violated Sections 8(3) and (4) of the Act by issuing a verbal warning to Robert Huggins (herein Huggins) on September 18 as well as written warnings to Huggins on August 30 and September 13 and by suspending Huggins on September 4. The complaint further alleges that Respondent violated Sections 8(a)(3) and (4) of the Act by terminating Huggins on September 30 because of his union and concerted activities and because he filed charges or gave testimony under the Act. Respondent filed a timely answer on February 12, 2003. At the opening of the hearing on April 28, Counsel for the General Counsel moved to amend the complaint to also include allegations

¹ All dates are 2002 unless otherwise indicated.

that Respondent issued written warnings to Huggins on August 26 and 28. I granted General Counsel's motion. General Counsel also moved to amend the complaint to include the allegation that on or about May 6, Respondent instituted a stricter attendance policy and I denied General Counsel's motion.²

A hearing on these matters was conducted before me in Panama City, Florida on April 28, 29, and 30, 2003, at which all parties had the opportunity to present testimony and documentary evidence, to examine and cross-examine witnesses, and to argue orally. General Counsel and Respondent filed briefs, which I have duly considered. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following:

Findings of Fact

I. Jurisdiction

Respondent has an office and a place of business in Panama City, Florida and a facility in Cedar Grove, Florida where it is engaged in building piping used in cooling systems for turbines and electric generating plants. Annually Respondent sold and shipped goods valued in excess of \$50,000 to customers outside the state of Florida. During the same period, Respondent purchased and received at its Cedar Grove, Florida facility, goods valued in excess of \$50,000 directly from points outside the State of Florida. Respondent admits that for the period of time between June 3, 2002 through September 30, 2002, it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act. I find Respondent an employer engaged in commerce within

² General Counsel's complaint includes allegations that Respondent violated Sections 8(a)(3) and (4) of the Act by issuing Huggins verbal and written warnings in August and September as well as terminating his employment in September. The parties stipulated that Huggins was hired by Respondent in mid-January 2002 and laid off on March 21. He was recalled on June 3 and later testified in the Board's administrative proceeding in Case No. 15-CA-16530 on August 26. The Board has found that the General Counsel may add complaint allegations that occur outside the 6-month 10(b) period, if they are closely related to allegations in a timely filed charge. In determining whether the new allegations are closely related, the Board considers whether the otherwise untimely allegations are of the same class as the violation alleged in the pending timely charge. The Board also considers whether the untimely allegations arise from the same factual situation or sequence of events as the allegations in the pending timely charge. Finally, the Board considers whether Respondent would raise the same or similar defenses to both allegations, and thus whether a reasonable respondent would have preserved similar evidence and prepared a similar case in defending against the allegations in the timely pending charge. *Redd-I, Inc.*, 290 NLRB 1115 (1988). Respondent's implementation of its attendance policy preceded Huggins' testimony in the Board proceeding. Further, I note that the attendance policy was implemented almost four months prior to General Counsel's presenting evidence and prosecuting charges in Case No. 15-CA-16530. Accordingly, Respondent's implementation of the May attendance policy does not appear to arise out of the same factual situation or sequence of events as the allegations in the pending timely charge and a reasonable respondent would not have known to preserve similar evidence or prepare a similar case in defending itself against the otherwise untimely allegation as it would in defending against the allegations in the timely pending charge.

the meaning of Section 2(2), (6), and (7) of the Act and the Union as a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Issues

After testifying in the Board's proceeding in Case 15-CA-16530 on August 26, Huggins received a verbal warning and three written warnings for his work performance on August 26, 28, 30, and September 18, respectively. Huggins additionally received a written warning on September 13, a suspension on September 4, and his termination on September 30 for violations of the attendance policy. General Counsel alleges that all of the discipline administered to Huggins after August 26 was given because of his Union and protected activity and was thus violative of the Act. Additionally, General Counsel alleges that Huggins was threatened on September 4 because he testified against Respondent. General Counsel further alleges that from August 30 until his discharge on September 30, Respondent failed to take action regarding harassment of Huggins. For the reasons set forth below, I find that Respondent issued warnings to Huggins on August 26, 28 and 30 and on September 18 in violation of the Act. I do not find that the record evidence supports that Respondent issued any other discipline to Huggins in violation of the Act nor do I find that Respondent threatened Huggins as alleged or that Respondent failed to take action regarding any harassment of Huggins.

B. Background

Respondent is engaged primarily in the business of building piping used in cooling systems for turbines and electric generating plants. In early June, Respondent employed approximately 68 employees. James Scott is the majority owner of Respondent and is responsible for the day-to-day operation of Respondent, including the formulation and execution of the attendance policy implemented on or about May 6.

Respondent hired Huggins as a welder on January 16. On March 21, Huggins was laid off and then later recalled on June 3. On May 31, the Regional Director for Region 15 issued a complaint against Respondent based upon charges filed by the Union. The complaint contained various allegations of 8(a)(1) conduct as well as an allegation that Respondent discriminatorily laid off 19 employees in March. Based upon the May 31 complaint, a trial was held before Administrative Law Judge George Carson II on August 26, 27, and 28. In his decision that issued on November 1, Judge Carson found that five employees were discriminatorily laid off. Huggins was not included as one of the employees found to be discriminatorily laid off. In his decision, Judge Carson referenced the testimony of Huggins concerning an alleged 8(a)(1) statement by supervisor Steven Phelps. During Huggins' August 26 testimony in the prior proceeding, Huggins testified that he had worn a union sticker on his welding helmet on the day of his layoff.³

³ The transcription section that included Huggins' August 2002 testimony was received into evidence as General Counsel Exhibit No. 14 for the limited purpose of providing background to the charges in this current matter. I do not find Huggins' earlier testimony as specific evidence of Union activity, however his testimony constitutes notice of alleged Union activity for purposes of this matter.

C. Complaint Paragraph 7

5 General Counsel alleges that about September 4, Respondent, by Superintendent Steven W. Phelps, threatened employees by informing them that Respondent did not want them to be employed by Respondent because they had testified against the Respondent. Huggins testified that approximately a week after the August trial, he had a conversation with Phelps as they were walking into work. Phelps asks Huggins how things went at the trial. Huggins replied, “Everything went okay”. Huggins testified that Phelps made the statement that “he wished all
10 this would go away and things would go back to normal”. Huggins also recalled that Phelps added that Jim Scott hated the fact that he (Huggins) was out there because he testified for the Union. Phelps denied that he made any comments to Huggins about the August trial.

D. Complaint Paragraph 8**1. Huggins’ Complaints**

15 General Counsel alleges that starting about August 30 and continuing until about September 30, Respondent failed to take action regarding harassment of pro-union employees. Huggins was the only employee that General Counsel presented in support of this allegation.

20 Amperage knobs are the knobs or controls that regulate the amount of power used to melt the wire for the weld for both the “tig” and “mig” welding machines. On August 30, Huggins was working on a mig welding machine in the weld-out area in the back of the facility. After rolling carbon steel all morning, Huggins took a break. After he returned from break and resumed welding, he noticed that his mig tip melted away because of the machine’s heat. He checked his welding machine and found that the amperage knob was at a level that was entirely too hot. He also noticed that the control that regulates the wire feed had also been increased.
25 Huggins noticed that the argon gas that is used in the welding process had been turned off as well. Additionally Huggins discovered that the jack stand that holds the pipe for the welding process had been lowered several inches. Huggins testified that when he reported this incident to Supervisor Harry Nelson, Nelson told him that he should check his rolling machine the next time before resuming work. Huggins did not recall whether Nelson said that he would talk with other employees and find out what happened. Huggins confirmed that Nelson was the only supervisor to whom he reported this incident.
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40 Huggins worked on a tig machine on September 20. He described the tig machine as a welding process that uses tungsten to strike an arc on the pipe and to create an arc to melt wire. Huggins recalled that as he began welding, he noticed that what he thought to be the tungsten material uncharacteristically melting away. As it cooled, he examined it more closely and found that it was not tungsten at all, but rather a piece of stainless steel wire made to look like a one-eighth piece of tungsten. He explained that it appeared to be a wire cut to the length of tungsten with the ends ground with points as with tungsten. Huggins went to supervisor Harry Nelson and reported that someone deliberately put the stainless steel into his machine. Huggins recalls that Nelson suggested that someone was trying to play a joke on him and also suggested that he check his rolling machine again before going back to work. Huggins told Nelson that he didn’t think that it was very funny when someone was sabotaging his machine.
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Huggins testified that when he went out to his car after work on September 20, he discovered that his door was open and his windshield sun block was missing. He also noticed a balled-up roll of duct tape thrown on his floorboard. The next day he reported the condition of his car to Nelson. Nelson suggested that he needed to lock his car. Huggins explained to Nelson that his car was a 1962 New Yorker and the locks didn't work. Huggins testified that after that time, he brought a car to work with a functioning lock. Huggins did not recall whether Nelson told him that he would check with other employees and investigate the matter. Huggins confirmed that he did not report this incident to any other supervisor.

Huggins also testified that approximately a week before he was terminated, he was working in the front of the rolling tables. Ray Adams was the welder who was working nearest to him. As Huggins was welding, he received a blast of sparks from behind his head and the sparks entered his welding shield. Huggins noticed that the sparks were coming from the grinder in the welding booth used by Adams and employee Gerald Nelson. Huggins asked them to throw their sparks in a different direction. Huggins did not recall that Adams said anything to him, however he recalled that Adams stopped grinding. Approximately 20 minutes later, the sparks were thrown in his direction again. Huggins yelled at them and told them to turn their sparks in a different direction. Huggins did not recall if they responded to him in any way. When Huggins told Supervisor Nelson that they were throwing sparks on him and that Nelson needed to do something, he told Huggins that he would look into it. Ray Adams testified that there were a "couple of times" that Huggins complained that the sparks were burning him. Adams explained that when a welder is grinding a piece of pipe, the direction in which the sparks shoot from the grinder changes as the welder moves around the pipe. Adams explained that normally when sparks are sprayed into another welding booth, the person in the next booth will simply step out of the way for a few seconds because the sparks will continue to move on and change to a different direction. Adams recalls that he may have told Huggins to step out of the way, because that is normally what he tells someone if the sparks are falling on that person. Adams recalled that Huggins cursed him and accused him of burning him with the sparks. Adams denied that he intentionally threw the sparks on Huggins.

Supervisor Harry Nelson recalled that Huggins complained to him about the incidents involving the tungsten and the amperage knobs on his welding machine. Nelson testified that he went through the work area and asked other employees what they knew about these incidents. Nelson recalled that he went back to Huggins and told him that no one knew anything about these matters. Employee Gerald Nelson testified that supervisor Harry Nelson came to him and asked him if he had seen anyone in Huggins' work area or tampering with Huggins' equipment. Supervisor Nelson also recalled Huggins' complaints about his car. Nelson recalled that Huggins stated that if he caught anyone going in his car or messing with anything of his, he would "beat their fucking ass". Nelson testified that he also talked with the other employees about Huggins' complaints about the interference with his car. He went back to Huggins and told him that no one knew anything about what had happened to his car. When Huggins complained of the sparks in his welding area, Nelson went to Ray Adams. Nelson testified that while it was not unusual for sparks to fly in the shop area, he gave Adams a verbal warning.

2. Respondent's Treatment of Huggins as compared to other employees

Harry Nelson testified that Respondent did not treat Huggins any differently than it did any other employee. Employee John David Frye testified that he had not observed any other

employee accommodated as much as Huggins. Employee Ray Adams also testified that he did not know of any employee who had been accommodated as much as Huggins. Adams testified, “I think they’ve bent over backwards to accommodate him.” Gerald Nelson worked as a welder for Respondent from March 2000 until December 2002. Nelson testified that he left his job with Respondent in 2002 because he was not getting enough hours.⁴ Respondent’s counsel asked Nelson if he had any reason to believe that Huggins was treated any differently than other employees. Nelson responded by stating that Huggins was treated better than anyone else. Nelson maintained that Respondent went above and beyond to help and to accommodate Huggins. Nelson also described Huggins as complaining about everything. In further response concerning Huggins’ complaints, Nelson testified:

He complained about sparks, that people, when they were grinding sparks would come over and hit him; he complained about people were messing with his machines and nobody ever messed with his machines- - I mean, I was right there beside him and I never seen anybody mess with his machines. I just really don’t think he knew what he was doing. I mean, he just kept on and on and on, it just gets to a point you try to tune him out. He complained about everything.

Respondent’s counsel asked if he remembered any other specific complaints and Nelson testified:

He complained about the attendance policy; he complained about people who were harassing. I guess probably it’s easier to say that he didn’t complain about time to go home; that was about the only thing he didn’t complain about.

Respondent presented evidence that upon Huggins’ return from layoff in June, he complained about a number of working conditions in the plant. Upon his return from layoff, Huggins worked in the weld-out area in the back of the facility. Huggins confirmed that while working in that area, he complained about the fumes from the pickling vats. Human Resources and Safety Director John Goldberg testified that when Huggins complained of the fumes, Goldberg ordered respiratory protective equipment for Huggins’ use. Upon receipt of the equipment, it was determined that Huggins would also need a special welding mask to fit with the respiratory equipment. Huggins acknowledged that Goldberg told him that he would try to get him another mask. Before Respondent received the equipment however, Huggins was moved to a different area of the plant to get him away from the fumes. Huggins testified that while working in this same area, he might have mentioned that it was hot, however he had not complained about being hot. Employee John Frye however, recalled that while working in weld-out, Huggins complained about not only the fumes but also the heat. Frye recalled that at one point, Huggins had as many as three fans for his use in weld-out. Scott testified that in addition to placing the fans near Huggins, Respondent also ordered Huggins an air vest, which is designed to provide additional cooling. Scott recalled that other than the complaints about the

⁴ Union Organizer Gregory Boggs testified that Nelson contacted him during the 2002 Christmas holiday and told him that Scott had terminated him. During the conversation, Nelson asked him to explain Judge Carson’s decision that had issued in November in the former proceeding.

fumes and the heat, Huggins also complained about his weld-out machine and special modifications were then made to the machine.

5 Scott testified that Huggins initially worked in the portion of weld-out that was in the left rear of the back of the facility. Because of Huggins' complaints about the fumes and because it appeared that it might be sometime before Respondent received the additional respiratory equipment, Huggins was moved to the weld-out area on the right side of the back of the building and approximately 40 to 50 feet on the opposite side of the building. The new workstation was near a large door, estimated at 16 by 18 feet. Scott recalled that after moving Huggins to the new location, Huggins complained about wind coming through the door and about the foot traffic in the area. Huggins denied that he complained about the traffic in this location and he testified that he didn't recall complaining about the wind.

15 Scott testified that because of Huggins' continuing complaints in weld-out, he was moved to work at Table 3 in the front of the facility. Huggins admitted that the only reason that he was moved to a workstation at the front of the facility was to accommodate his complaint about the fumes. Huggins recalled that after he began working at the front of the facility there were occasions when a large amount of wind would come threw the doors that were near to his work area. The wind blew out the gas underneath his tig rig and affected his weld. Huggins testified that when this occurred, he simply walked over and closed the open door. He denies that he ever complained to anyone about this problem.

25 Huggins recalls that while working in the front of the facility, he complained about the worktables being too close. Huggins testified that because of the closeness of the tables, the sparks from Gerald Nelson and Ray Adams' work area were coming into his area. Huggins complained to Scott about this problem. Huggins testified that in response to his complaint, Scott told him that Ray Adams was a "scum-sucking asshole" for throwing sparks on him because he knew better than to do that. Scott told Huggins if it happened again to just get out of the way and Huggins testified that he did so.

30 Scott recalled that there had been an occasion when he was walking near Huggins' workstation and he heard sounds as though things were being thrown about. He testified that he walked up to the welding blind, looked inside, and asked Huggins what was wrong. Scott described Huggins as cursing and stating "Some S.O.B. stole my medicine." As Huggins explained that he had found his medicine missing when he returned from break, he also added "F'ing Steve Phelps" took his medicine. Scott recalled that he responded "Well, Robert, wait a minute. That's a heck of an accusation to make. Are you sure?" Huggins replied that he was sure. 40 Scott testified that he had his two-radio with him and he told Huggins that he would get this matter straightened out and would call the authorities. At that point, Huggins told him to wait because he may have left the medicine at home. Scott testified that he told Huggins to check out his medicine that evening and if he still felt that Phelps had stolen his medicine, he should let Scott know the next morning.

45 Huggins testified that he kept Prevacid in his locker at work. He recalled that one day he discovered that it was missing. Huggins recalled that he told both Harry Nelson and Scott about his missing Prevacid. He told Scott that Phelps was the only person who knew that he kept it in his locker. Huggins recalled that later that same day, Scott came back to him and asked him if he would be willing to provide a written statement and to make a formal complaint as to what

happened. Huggins admitted that he declined because he “didn’t want to make a big deal” about it. Huggins acknowledged that Scott may have offered to call the police but he could not recall. He recalled however, that Scott told him to let him know if Huggins could not find the medicine. Admittedly, Huggins never reported back to Scott as to whether he found his medicine. He also recalled that he later told Scott that he needed to go to the doctor to have his prescription refilled.

E. Huggins’ discipline for Work Performance

General Counsel alleges that Huggins received four warnings for his work performance between August 26 and September 18. The record reflects that three of these warnings were given to Huggins within a five-day period. Scott testified that at the time of Huggins’ discharge for violating the attendance policy, he was not in a progression discipline schedule for his work performance. Scott also explained that eventually the performance discipline would result in termination if the numbers continued to grow. He added however, that there were no particular number of disciplinary actions that would trigger a termination as each incident had to be weighed individually.

F. Respondent’s Attendance Policy

Respondent’s Human Resources and Safety Director John Goldberg testified that when Huggins returned from layoff, he and six other employees were given an orientation on June 3. During the orientation, Goldberg updated prior employment data and gave an overview of company employment and safety policies. Goldberg also recalled that he covered the new attendance policy that had been implemented in May in the June 3 orientation for Huggins and the other employees. Huggins admitted that the attendance policy may have been covered during his June orientation, however he testified that he didn’t recall the “specifics on it”. While Huggins asserts that he was not given anything in writing on the new policy, he admitted that the policy might have been posted on the Respondent’s boards throughout the facility. Huggins testified that he never noticed nor read the policy. Former employee Gerald Nelson testified that Respondent posted memos concerning the new attendance policy in the break rooms and near the clock-out area. Nelson recalled that the memos remained posted from the time that the policy was implemented until at least December.

G. Application of Respondent’s May 2002 Attendance Policy

On May 6, Respondent established a new attendance policy. Under the policy, all outstanding attendance violations were erased and all employees began with a clean slate. The policy provides for progressive discipline for its infractions and the progression includes a verbal warning, a written warning, a suspension, and ultimately discharge for any one of the four types of violations. The policy can be violated when an employee is absent, tardy, leaves early, or has a time card discrepancy that is not excused. The policy provides that four unexcused incidents of the same kind of violation occurring in any twelve (12)⁵ month calendar period will result in discharge. The written policy states that each incident of excessive absenteeism or tardiness shall be evaluated on a case-by-case basis. Absences may be excused when the employee

⁵ The policy was later amended to cover only a six month period, giving employees a chance to begin with a new slate after the initial six-month period.

follows company call-in procedures and the employee returns to work with supporting documentation from a treating physician. Absences may also be excused when they are prescheduled for compelling reasons and with prior managerial approval. The policy further states that the company will require documentation of authorized reasons for absence where appropriate. Employees are further informed that while calling in does not excuse an
 5 unscheduled absence, it permits mitigating and extenuating circumstances to be weighed prior to imposing disciplinary action.

Initially, Respondent's President James Scott and Vice-President Kevin Scott reviewed
 10 compliance with the attendance policy daily. After Kevin Scott left the company, Goldberg assumed that responsibility. Goldberg testified that he collects the time card data the first thing each morning. If there is no basis to excuse the employee's absence or policy infraction, the employee receives the appropriate discipline. If there's an unexcused absence or unexcused infraction that requires disciplinary action, the disciplinary decision is made by James Scott and
 15 reviewed with the individual employee.

Scott testified that he implemented the new policy because his supervision let him down and failed to keep up with employee attendance, as they were required. Scott explained that he
 20 took the attendance policy away from his supervisors so that he could oversee it and get it back under control. When the new attendance policy was implemented on May 6, all employees were given a clean slate with respect to prior absences or infractions. Under the May 6 attendance policy, an employee was expected to turn in a request to their supervisor if they wanted to take off or if they knew in advance of their absence. Scott explained that even if the employee
 25 submits a request in advance, the request is not automatically granted. During the first six months of the new policy, employee Cindy Arledge was given the responsibility of obtaining follow-up information from the employees and securing the required documentation for the absence. If the employee provided a proper doctor's excuse to Arledge, the absence would be excused without involving Scott. In those situations in which Arledge had a question or if she
 30 felt the absence was not excusable, Arledge brought the matter to Scott for review.

H. Discipline administered to Huggins for attendance infractions that is not in dispute

The record reflects that Huggins received verbal and written warnings for infractions
 35 under the new attendance policy prior to his testifying in the August Board proceeding. On June 13, Huggins was given a verbal warning for leaving work early to go to the doctor and failing to provide the required supporting documentation. On June 25, Huggins was given a verbal warning when he called in sick and provided no doctor's statement in support of his absence. On
 40 July 2, Huggins was given a verbal warning for being tardy. He called in to report that he would be late because his son was "stuck in the couch". On July 17, Huggins was given a verbal warning because he did not clock in when he returned from lunch. On July 24, Huggins received a written warning for his second tardy. He received a written warning on August 2 when he
 45 again failed to clock in from lunch.

I. Huggins' Infractions of the attendance policy that were excused without discipline

On June 17, Huggins was excused for being late to work because he stated that he was not told that the hours had changed. His tardiness of June 27 was excused because of a time clock error. Huggins was excused for leaving work early on June 28 after injuring his back at

work. Huggins' tardiness on July 1 was documented as excused because he had a note from Goldberg and Huggins provided documentation of a medical appointment. Huggins' absence on July 5 was excused because his supervisor and the production manager preauthorized his absence. Huggins was excused for leaving work early on July 19 when his wife brought in parts to document that his vehicle had broken down in the parking lot. Huggins was also excused for his tardiness on August 14 when he provided documentation of his car repair. Huggins was again excused when he left work early on August 30. Respondent's records reflect that the Florida Highway Patrol called Respondent to confirm that Huggins' wife had car trouble on the Hathaway Bridge and Huggins was needed to move the vehicle. During cross examination, Huggins admitted that he stated in his affidavit to the Board on August 30 that he had called his wife during lunch on August 30 and he asked her to call him at work and report that she had an emergency. He admitted that he had done so because he wanted to leave work early to talk with Union Representative Boggs. Despite his admitted testimony in the affidavit, Huggins denied that he told Respondent that his wife's car had broken down in order to leave early.

J. Discipline administered to Huggins after his August testimony

1. The September 4 warning and suspension

Huggins was given a three-day suspension on September 4 for his September 3 absence and his failure to provide a doctor's statement. On direct examination, Huggins testified that he had been absent on September 3 because he went to the doctor to get a prescription filled. He maintained that prior to his absence he told Scott that he had to go to the doctor to get his prescription filled. While the record is not clear on this point, it appears that the medicine in question was the same medicine that Huggins had earlier accused Supervisor Phelps of removing from his work area. He denied that while he was never asked for a receipt for the medicine, he told Scott and Nelson that the medicine costs \$150. He initially denied having any conversation with Cindy Arledge about this absence.

Arledge testified that the job that Scott gave her in enforcing the attendance policy was "not one that a lot of employees would probably take." She explained that she often received a good deal of ridicule from other employees and she was referred to as the "police" or the "narc". She believed that Huggins saw her as the "enemy" when she attempted to get documentation for his absence. She recalled that when she first asked Huggins for his paperwork for this absence, he had been very arrogant and rude and demanded to know why he had to give it to her. The following day she again asked Huggins for the paperwork and he responded to her in the same manner. At that point, she went to Huggins' supervisor, Harry Nelson, and asked him to accompany her to talk with Huggins. In Arledge's presence, Nelson explained why Arledge needed the documentation and Huggins acknowledged that he didn't have the documentation. Arledge testified that at that point, she had no alternative but to take the matter to Scott.

Arledge testified that she was present when Scott spoke with Huggins about the absence. During the meeting, Huggins admitted that he had no doctor's statement because he had only refilled his prescription. During General Counsel's case in rebuttal, Huggins testified that he went to the doctor to get his prescription filled for the Prevacid medication and then he went to the pharmacy to have the prescription filled. Huggins did not deny that he failed to provide any documentation for the absence. Although he initially denied having any conversation with Arledge during Counsel for General Counsel's direct examination, Huggins testified on rebuttal

that he recalled the conversation with Arledge. Huggins maintained that when Arledge first asked him for documentation for his absence, he had not known who she was and he didn't think that it was any of her business. He further confirmed that Arledge came back to him later in the day accompanied by Nelson. Huggins recalled that he told Arledge and Nelson that because he had filled out paperwork in advance of getting his prescription filled, he didn't need a doctor's excuse. Huggins admitted however, that Arledge told him that she still needed a doctor's excuse for his absence. Huggins recalled that he told Arledge that the only way he could provide a doctor's excuse was for him to leave work and go to get one. Huggins recalled that same day he was called into the office to talk with Scott with Arledge present. Huggins testified that while in the office, he apologized to Arledge for his remarks to her. When testifying Huggins denied any admission to Scott that he had not gone to the doctor.

2. Huggins September 13 written warning

Respondent issued a written warning to Huggins on September 13 for his second unexcused incident of leaving work early. The notice of warning documents that Huggins left work at 1:55 p.m. because his wife was out of gas. Huggins presented a gas ticket showing the purchase of gas at 3:43 p.m. While Huggins signed the warning, he noted on the bottom that he did not agree with the discipline. Huggins testified that his wife called him on September 12 and reported that she ran out of gas while she was picking up their children from school. Huggins told Nelson that he had to leave in order to get his wife before the school closed the gates. Huggins asked Nelson if he needed to bring a receipt and Nelson told him that he did. Although Huggins returned with the receipt the next day, he was called into Scott's office and given a written warning. Scott showed Huggins his attendance record and told him that his next absence or incidence of leaving early would result in further discipline.

Arledge testified that her job involved bringing absences to Scott's attention. Scott testified that if an employee had a proper excuse and Arledge had no questions, the absence would be processed without further attention. In those situations where Arledge had questions or thought that the absence was inexcusable, she brought the matter to Scott. Arledge recalled that when Huggins presented his gas receipt in support of his leaving early on September 12, there had already been one or two times previously when Huggins left work for this same reason. Arledge testified that this was the second or third time that Huggins tried to get excused for the same reason and she brought it to Scott's attention because she didn't think that it was right. Arledge was present with Scott when he spoke with Huggins about this absence. Arledge recalled Scott's telling Huggins that it didn't matter that he had a receipt because he had work that had to be finished. Scott explained that he needed Huggins there and he couldn't have him leaving every day. Arledge recalled Scott's saying, "If every one of my employees left every day to take their wife gas, how many of us would be employed?"

3. Huggins' termination

Huggins' notice of termination reflects that he called the front desk on August 27 and reported that he was going to be absent because of car problems. The termination notice documents that Huggins was terminated because he had no repair bill for documentation. Huggins testified that he missed work on August 27 because he had to take his car in for repair. When Huggins returned to work on August 30, Nelson asked for an excuse to cover his absence. Huggins responded that he did not have any documentation because his car was not ready for

return. Huggins admitted at the hearing that after receiving the previous suspension, he understood that he could be terminated for his next absence.

Scott not only denies that Respondent treated Huggins more harshly than other employees, but he testified that Respondent treated Huggins more leniently under the attendance policy than other employees. He explained that he was aware that Huggins was taking daily notes. Because Scott felt that Huggins was looking for a reason to do something to Respondent, he tried to be careful and give Huggins the benefit of the doubt.

K. General Counsel's Evidence of Animus

On January 30, Scott sent a letter to Eric Johnson, a welding instructor at the Bay County Florida Vocational School. In the letter, Scott accused the instructor of providing no assistance to him or students employed by Respondent because Respondent was a non-union shop. Scott further stated:

You misunderstood why I would not contact the School Board members, Guidance Counselors, etc. on your behalf. The reason I would not contact any of the people mentioned above or sit on your advisory board was that I did not want to be a part of your unionizing effort. At one time, you even had a union representative on this committee. You told me in my own shop how good my shop could have been had it been union. That was the last conversation you and I have had and the last time I donated material for your students.

General Counsel also presented additional evidence of animus through the testimony of Huggins. Huggins recalled that on the same day that he noticed that his jack stand had been altered during his break, he took a water break near his workstation. Huggins explained that the water source is located in the middle of the shop area near where his supervisor "normally hangs out." As he was drinking water, he observed Steve Phelps talking with Ray Adams. Phelps looked toward Huggins and stated "This man right here might be running the shop one day and there will be a shop steward at every station." At the time of his comment Phelps was approximately 7 feet away from Huggins and looking in Huggins' direction. Huggins testified that Adams laughed and appeared to view Phelps' comment as a joke. After making this statement, Phelps left the area and Huggins went back to work. Phelps testified that he did not recall the conversation with Adams or any similar conversation. Although Ray Adams testified concerning other matters, he did not corroborate Phelps' denial of the conversation.

Huggins also recalled another comment made by Phelps on a different occasion, however he could not recall the exact date. Huggins estimated that the comment might have occurred the day after Phelps talked with him about his testifying in the Board proceeding. Huggins was in the break room when Phelps "burst through the door." Huggins recalled that in a loud voice, Phelps made the comment that no one respected his authority and that he ought to get Huggins to lie for him. Huggins estimated that Phelps was approximately five or six feet away from him when he made the remark. Huggins provided no additional testimony as to whether he said anything in response to Phelps or what occurred after the comment was made.

Huggins testified that approximately three days after his suspension, he was welding a piece of pipe in the weld-out area. He was using two jack stands to weld because the weld-out machine was broken. When Harry Nelson and Scott walked by his work area, Scott asked why he was not using the rollout machine. Huggins explained that the machine was broken and if they wanted him to use it, it would have to be repaired. Huggins recalled Scott's stating that it was asinine that he was not using this welding machine. Scott then mentioned that he had heard Huggins testify in the Board hearing that the rollout machine slowed the process in the rolling shop. Huggins recalls that he told Scott that was a lie and he denied that had been his testimony in the hearing. Huggins explained that he then clarified for Scott his testimony concerning the welding steps that slowed the process. Huggins testified that he then told Scott that he had nothing further to say to him about the trial and he walked away.

II. Analysis and Conclusions

A. Alleged 8(a)(1)

The record evidence contains no independent allegations of 8(a)(1) conduct other than the alleged threat by Phelps to Huggins. General Counsel alleges that Phelps told Huggins that he "wished that all this would go away and things would go back to normal." Phelps went on to add that Scott hated the fact that Huggins was "out there" because he testified for the Union. Phelps denies this conversation with Huggins. While I do not find Huggins to be an especially credible witness, I find Phelps less credible. The overall record supports a finding that Phelps made comments directed toward Huggins' activity in support of the Union as well as his testifying in the Board trial. I credit Huggins' testimony that Phelps' joked about Huggins' running the shop and having Union stewards at every workstation. I find Huggins' credible in light of the fact that Adams did not corroborate Phelps' denial of the conversation. While Phelps denies the alleged comment about getting Huggins to lie for him, I don't find his denial credible. Based upon Phelps' other comments to Huggins, the record supports a conclusion that he also told Huggins during this same time frame that Scott hated his being "out there" because he had testified for the Union. I note however, that in making this comment to Huggins, Phelps made no threat of reprisal or prediction as to the consequences of Huggins having done so. Accordingly, I find no evidence of a threat that would constitute a violation of Section 8(a)(1) of the Act.

The Board has previously found that while an employer's expression of its views or opinions against a union without an explicit threat of reprisal cannot be deemed a violation in and of itself, it can nonetheless be used as background evidence of antiunion animus on the part of the employer. *Tejas Electrical Services*, 338 NLRB No. 39, fn. 5 (2002). *Mediplex of Stamford*, 334 NLRB 903, slip op. at 1(2001). Crediting Huggins' testimony, I find Phelps' comment as evidence of animus toward Huggins for his having testified for the Union.

B. Whether Respondent failed to take action regarding harassment of Huggins

Huggins testified concerning a number of incidents alleged to have occurred during the month after he testified at the Board trial. Huggins testified concerning specific incidents occurring on August 30, September 20, and a date estimated as approximately a week before his termination. General Counsel alleges that Respondent failed to take any action concerning Huggins' complaints. Huggins contends that on August 30 he found his welding machine's amperage knob turned higher and the jack stand, which held the pipe to be welded, lowered. He

also noticed that the argon gas that he used in the welding process was turned off. Huggins reported these incidents only to his immediate supervisor, Harry Nelson. He could not recall whether Nelson told him that he would talk with other employees to find out what happened. Huggins also testified that he told Nelson about the substitution of the stainless steel wire for tungsten and the disappearance of his car's sunscreen on September 20. Huggins acknowledged that he only spoke with Nelson about these incidents and he could not recall whether Nelson told him that he would speak with other employees and investigate the matter. Huggins did recall that Nelson suggested that someone might have been playing a joke on him with the exchange of the stainless steel for the tungsten. Huggins recalled that when he reported to Nelson that employees Ray Adams and Gerald Nelson had been throwing sparks into his area, Nelson told him that he would look into it. Huggins also recalled that when he complained to Scott about Adams' throwing sparks on him, Scott made disparaging remarks about Adams.

Supervisor Harry Nelson testified that after Huggins reported the changes to his welding machine, the substitution of the steel for the tungsten, and the tampering of his car, he went through the work area and asked employees what they knew about these incidents. In response to Huggins' complaints about Adams' throwing sparks, he talked with Adams and ultimately gave Adams a verbal warning. I found Nelson to be a credible witness. His testimony was further bolstered by the testimony of former employee Gerald Nelson. The record contains no evidence of any familial relationship between Supervisor Harry Nelson and employee Gerald Nelson. Gerald Nelson recalled Harry Nelson's having asked him if he had seen anyone in Huggins' area or if he knew anything about anyone tampering with Huggins' equipment. Crediting both Harry Nelson and Gerald Nelson, the record evidence is insufficient to show that Respondent failed to take action regarding harassment of Huggins or any other pro-union employees.

On the contrary, the record demonstrates that Respondent was especially responsive to Huggins' complaints. As discussed above, Scott, other supervisors, and employees provided extensive testimony about Huggins' complaints and Respondent's attempts to accommodate Huggins. The most credible evidence of Huggins' penchant for complaints and Respondent's attempts to respond came through the testimony of former employee Gerald Nelson. At the time of his testimony, Nelson had been out of the Respondent's employ for approximately four months. The record contains no basis for any loyalty or vested interest beyond that of any other former employee.⁶ The overall tenor of Nelson's testimony was his observation of Huggins' repeated complaints about his working environment. Employees Nelson, Adams, and Frye all confirmed that Respondent accommodated no other employees as much as Huggins. The record is without dispute that in response to Huggins' complaints, Respondent ordered special respiratory equipment for him, provided him with a cooling vest, and relocated his working area at least twice. Scott acknowledged that Respondent tried to accommodate Huggins with his various complaints because of his having testified against the company in court. Scott maintained that while Respondent was very careful about what action it took with respect to Huggins; nothing was sufficient to pacify Huggins. Accordingly, I don't find that Respondent was unresponsive to Huggins' complaints as alleged in the complaint. As Counsel for

⁶ Although Union Representative Boggs testified that Nelson talked with him in December about Scott firing him, Nelson denied any conversations with Boggs. While I find Boggs to be a credible witness, the record contains no evidence of Nelson' having a vested or personal interest that would discredit his testimony concerning Huggins' alleged complaints.

Respondent points out in their brief, Huggins' admissions belie the assertion that Respondent did not investigate Huggins' complaints about his acid reflux medication. Admittedly, after Huggins alleged that Phelps took his acid reflux medicine, Scott offered to contact the police and to confront Phelps with this matter. Rather than letting Scott pursue either of these actions, Huggins stated that he might have left the medicine at home. Huggins also admitted that Scott approached him later and gave him the opportunity to file a written complaint and Huggins declined. Counsel argues that by Huggins' own admissions, Scott offered to confront the accused, to call the police, and to take a formal written complaint from Huggins. Huggins declined all offers. I further note that this incident is the only incident in which Huggins identified to Respondent the identity of the individual who might have been responsible for the alleged harassment. There is no evidence that Respondent's managers or supervisors had any knowledge of the individual or individuals responsible for any of the other incidents of alleged harassment.

Accordingly, I do not find that Respondent was unresponsive to Huggins' complaints nor do I find that there is evidence that Respondent condoned or acquiesced⁷ in any alleged harassment to Huggins.

C. Huggins' Discipline

From August 26 to September 30, Respondent issued four work performance warnings to Huggins. Pursuant to the attendance policy, Huggins received a verbal warning, a written warning, a suspension and ultimately a termination on September 30. General Counsel alleges that Respondent took this action toward Huggins because of Huggins' union activity and because he testified in the August Board proceeding.

1. Discipline for Work Performance

Huggins received three warnings for work performance related to his welding between August 26 and August 30. He received a fourth warning for leaving a piece of foam rubber or a "purge dam" in a pipe on September 18.

Scott testified that prior to his being hired, Huggins took a pre-employment welding test, which was the very basic carbon steel, schedule 40 six-inch test where two heliarc passes are run through the pipe. During the test, Huggins had difficulty with the "root pass" or bottom portion of the weld. Huggins described the root pass as the first pass when two pieces of pipe are welded together. Despite the fact that Huggins did not pass the test, he was hired in January. By August 26, Respondent moved Huggins to table three performing root welds on stainless steel pipe. The warnings given to Huggins on August 26, 28 and 30 were either for excessive root pass penetration or for lack of root pass penetration in his welds. Scott testified that while all welders have to occasionally grind a little spot here or there, Huggins had to grind all 360 degrees of every root pass that he was welding. Scott admitted however, that the time period in which Huggins had difficulty with the root passes was the three to five day period when he was assigned to a fit-up welding table to work with a fitter. Prior to that time, Huggins worked by

⁷ *Giovanni's*, 259 NLRB 233 (1981).

himself in weld-out. Scott also admitted that the three warnings given to Huggins in August were the only discipline that Huggins ever received for welding problems.⁸

Huggins testified that when he worked in weld-out, he repaired other employee's welds for the same errors for which he was given a warning. He estimated that he observed these same errors as often as twice a week. General Counsel submitted records to show that between September 10 and November 21, Ray Adams was cited for six work errors, yet issued no disciplinary warning. Employee Scott Parsons was cited for five work errors between November 19 and December 12 and yet received no discipline. When Parsons was laid off, his supervisor indicated that not only would Respondent rehire Parsons but also that he would be strongly recommended to any company. While employee Alanza Russ is credited with five work errors between June 20, 2001 and December 14, 2001, there is no evidence that he was disciplined for these errors.

Huggins testified that a piece of foam rubber or a purge dam blocks the end of the pipe when argon gas is purged into the pipe to get rid of all of the oxygen. The process is used to insure a clean atmosphere for welding. Welders and the fitters are responsible for removing the foam rubber at the completion of their work process. On September 18, Harry Nelson asked Huggins to accompany him to the next building to talk with Quality Control Foreman Ken Beard. When Huggins and Nelson met Beard, he showed them a four-inch stainless steel pipe lying on the ground containing a piece of foam rubber in the end of the pipe. Nelson questioned Beard as to why they had been called over to see the pipe and why Beard had not simply removed the foam from the pipe. At that point, Huggins saw Scott walking toward them. Huggins recalls that Beard pointed to Scott and responded to Nelson, "You need to talk to that man right there."

Scott acknowledged that "it takes absolutely no effort to reach in and pull out" the purge dam from a pipe. He went on to testify however, that as long as the purge dam remains in the pipe, "it is a potential major catastrophe" and it is the responsibility of welders and fitters to remove it. He stated that if left in the pipe, the purge dam could cause extensive damage and expense to their customers. When Respondent laid off employee Timothy Speakman in January 2003, Respondent indicated a willingness to rehire Speakman in his employee termination review. Counsel for the General Counsel submitted records to show that Speakman made errors that generated costs to Respondent on November 19, 20 and 30, 2002.⁹ These mistakes came after Speakman had already received a three-day suspension for the quality of his work on October 7, 2002. The suspension was given after Speakman's August 28 work error and two other work errors on September 30 that resulted in estimated costs to the Respondent totaling approximately \$4500. Speakman was given a written warning for a mistake on May 22. The warning documented that the next incident would result in a three-day suspension.¹⁰ Despite the warning however, Speakman was documented with work errors on May 30, June 28, and August

⁸ While employee Nelson evaluated Huggins' welding ability at a level of 2, employee Adams estimated that Huggins' ability was at a 5 to 5 and a half on a 10 point scale. Employee Frye testified however, that Huggins was a "fair" welder and that he did a 'pretty good job'.

⁹ The total estimated costs for the three incidents totaled approximately \$150.

¹⁰ The record reflects documentation of errors attributed to Speakman for May 14 and May 22; estimated at an approximate cost of more than \$1100.

1, which were estimated to result in approximate costs of \$1600. Rather than a suspension however, Speakman was given a written warning on August 13 for an unacceptable root weld. The record reflects that Speakman alone was attributed with 14 documented performance errors between May 14 and November 30 at an estimated cost of over \$7300. Despite the fact that he received a written warning and a suspension, Respondent indicated a willingness to rehire him when he was laid off in January 2003.

Based upon the record evidence as a whole, I am unpersuaded that Respondent's performance warnings to Huggins were coincidental or unrelated to his Union or protected activity. There is no evidence that Huggins received any discipline for work performance prior to his testifying in the Board proceeding. Respondent knew that Huggins did not perform well with root welds as Huggins specifically failed the portion of the welding test related to root welds. With that knowledge, Respondent transferred Huggins to the fit-up table for a period of three to five days where he was given three warnings. In his brief, Counsel for the General Counsel argues that Respondent was setting up Huggins for failure. General Counsel's argument has merit. It is also noted that these three warning were given to Huggins during the five day period following his testifying at the Board proceeding. These warnings were also given within a 10-day period prior to Phelps' conversation with Huggins about his testifying for the Union.

Although Scott testified at great length about the potential expense that could result from an employee's inadvertently leaving a purge dam in a pipe, Respondent has documented only one instance when Huggins may have been responsible for such an omission. In contrast to this one incident, Respondent tolerated continued errors from Timothy Speakman at an estimated cost of over \$7300 and yet his performance did not affect his eligibility for recall. Scott testified that there is no formal progressive discipline system in place for work performance. He acknowledged however, that while there is no established number of incidents that triggers an automatic step in progressive discipline, an employee would be terminated "if they just kept growing."

In *Wright Line*, 251 NLRB 1083 (1980), enfd. F. 2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), the Board set out its causation test for cases alleging violations of the Act based upon the employer's motivation. The General Counsel is charged with the responsibility of making a prima facie showing sufficient to support the inference that the employee's protected conduct was a "motivating factor" in the employer's decision. It is only if General Counsel has made such a showing that the burden shifts to the respondent employer to demonstrate that it would have taken the same action in the absence of the employee's protected conduct.

A prima facie case is made out where the General Counsel establishes union or protected activity, employer knowledge, animus, and adverse action taken against those involved or suspected of involvement, which has the effect of encouraging or discouraging union activity.¹¹ Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case, even without direct evidence.¹² I find that General Counsel has established the requisite prima facie case as required by the Board in *Wright Line*. There is no dispute that Huggins engaged in protected activity when he testified on behalf of the Union in the

¹¹ *Farmer Bros., Co.*, 303 NLRB 638, 649 (1991), enfd. 988 F. 2d. 120 (9th Cir. 1993).

¹² *Tubular Corp.*, 337 NLRB NO. 13 (2001), slip op. at 1.

August Board proceeding. Within three days of his testimony, Respondent issued three disciplinary warnings to him for work performance and followed with a fourth warning for work performance nineteen days later. While Respondent states that there is no specific number of work performance warnings that will trigger further disciplinary action, Scott acknowledges that Respondent will terminate an employee if the alleged work deficiencies continue to grow.

5 Within three weeks of giving testimony, Respondent issued four warnings to Huggins for his work performance. It is apparent that the stage was set for further disciplinary action based solely upon his work performance. Thus, the record clearly demonstrates that Respondent took adverse action against Huggins immediately upon learning of Huggins' protected activity. The

10 requisite animus required for the Wright Line analysis is established through Phelps' statements to Huggins following his testimony. The credited evidence establishes that in the days following Huggins' testimony, Phelps referenced Huggins' testimony and his union activity on at least three separate occasions. He not only accused Huggins of lying in his testimony, but he told Huggins how Scott felt about him because of his testifying for the Union. He also jokingly

15 accused Huggins of wanting to become chief steward for the Union. The Board has found conduct that exhibits animus but that is not found to violate the Act may be used to shed light on the motive for other conduct that is alleged to be unlawful. See *Meritor Automotive, Inc.*, 328 NLRB 813 (1999). While I have found no specific threat or 8(a)(1) violation in Phelps' statements, I find that such remarks amply demonstrate animus toward Huggins.

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Crediting Scott's testimony in part, it is likely that Huggins demonstrated poor quality in the root passes on August 26, 28, and 30, inasmuch as he failed his pre-employment welding test because of this deficiency. Respondent was well aware of this deficiency when it re-assigned

25 Huggins to this work process. The record does not reflect the date of Huggins' reassignment, however Scott testified that he only worked on this particular job for three to five days. Thus, it is apparent that Huggins' assignment to a job for which he was not qualified occurred on or about the time of his Board testimony. The Board has found that suspicious timing may support an inference of animus and discriminatory motive. Respondent contends that Huggins was

30 moved to the front of the facility as a part of its total attempt to accommodate his complaints about the fumes. While this may be true in part, the record supports a finding of discriminatory motive as well. While the record reflects that Respondent has issued work performance discipline to other employees, I do not find that such conduct sufficient to meet Respondent's burden under Wright Line. Huggins had never received discipline for his work performance

35 prior to his testifying in the Board proceeding. Huggins was transferred to an area where he would be expected to have performance difficulty on or about the time of his protected activity. Almost immediately, Respondent issued three successive warnings for defective root passes. I find the total circumstances to warrant an inference that Respondent's true motive in issuing work performance discipline to Huggins was his protected activity. Additionally, Respondent

40 argues that the work performance warning issued to Huggins on September 18 was necessary because of the potential expense that could have resulted in the purge dam that was left in the pipe. The record evidence however, reflects that Respondent has shown tolerance to other employees whose work performance has resulted in significant expense to Respondent.

45 Respondent's records reflect that it would rehire employee Speakman despite his continued work errors that were estimated to cost as much as \$7300 over a period of six months. The circumstances of the September 18 warning support a finding of discriminatory intent. In his brief, Counsel for the General Counsel points out that Huggins was not simply informed that he had left the foam rubber from the pipe. He and his supervisor were instead, taken from his work area to another building, for Huggins to physically view the pipe with the offending foam rubber.

I credit Huggins' testimony that his supervisor Harry Nelson was incredulous that Quality Control supervisor, Ken Beard, interrupted Huggins' work to show him the foam rubber in the pipe. Based upon Huggins' credited testimony, Beard quickly explained that this action had been at the direction of Scott. The overall record suggests that Respondent seized the opportunity to add yet one more work performance warning to Huggins' record less than a month after Huggins testified for the Union. The Board has noted that because there is seldom direct evidence of unlawful motivation, circumstantial evidence may be relied upon to draw an inference of discriminatory motive. See *Abbey's Transportation Services*, 284 NLRB 698, 701 (1987), *enfd.* 837 F.2d 575 (2d. Cir. 1988). In this case, the overall circumstances and timing of Huggins' warnings for work performance supports a finding of discriminatory motive. In its brief, Respondent argues that the timing of Huggins' work performance discipline is not connected to any aspect of Huggins' union activity. Respondent argues that Huggins was needed to work at the table because of other employee absences. I note however, that while Respondent made this assertion at trial and in its brief, no evidence was submitted in support of the "unforeseen circumstances" that Respondent alleges. Finding Respondent's stated reasons for issuing the work performance warnings to Huggins as pretextual, I also find that the surrounding facts tend to reinforce an inference of unlawful motivation.¹³ Accordingly, I don't find that Respondent has sufficiently demonstrated that it would have issued work performance warnings to Huggins on August 26, 28, 30 and September 18, even without his protected activity and I find these warnings to be violative of Section 8(a)(3) of the Act.

2. Huggins' discipline for attendance policy infractions

After Huggins testified at the August Board proceeding, he received a suspension on September 4 and a written warning on September 13 before his termination on September 30. I find that with respect to the discipline imposed on these dates, General Counsel has established a *prima facie* 8(a)(3) case under *Wright Line*, 252 NLRB 1083 (1980), *enfd.* 662 F. 2d 899 (1st. Cir. 1981), *cert. denied* 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999); *Manno Electric*, 321 NLRB 278, 280 *fn.* 12 (1996). The initial three elements of the *Wright Line* analysis are clearly met. It is without dispute that Huggins engaged in protected activity, his activity was known to Respondent, and he received adverse employment action. The fourth factor in the analysis is the requisite link or nexus between the protected activity and the adverse employment action. *Hays Corp.*, 334 NLRB 48 (2001). As discussed above in relation to the work performance discipline issued to Huggins, Respondent demonstrated animus toward the Union and specifically toward Huggins for his support of the Union. The credited testimony reflecting animus toward Huggins includes statements made to Huggins within the weeks following his testimony on behalf of the Union. I find that the overall evidence of animus sufficient to establish the requisite link between Huggins' protected activity and the discipline administered to Huggins under the attendance policy.

Under *Wright Line*, an employer cannot carry its burden of persuasion by merely showing that it had a legitimate reason for imposing discipline against an employee, but must show by a preponderance of the evidence that the action would have taken place even without the protected conduct. *Hicks Oil & Gas*, 293 NLRB 84, 85 (1989), *enfd.* 942 F. 2d 1140 (7th Cir. 1991). This

¹³ *Shattuck Denn Mining Corp. (Iron King Branch)*, 362 F. 2d 466 (9th Cir., 1966)

burden is met with respect to the discipline imposed on September 4, September 13 as well as with Huggins' September 30 termination. Respondent has sufficiently demonstrated a legitimate reason for Huggins' discipline and has shown by a preponderance of the evidence that it would have taken the same action even without an illegal motive.

5 While Huggins testified that he did not notice nor read the attendance policy that was implemented in May, he acknowledged that Goldberg "might" have covered the policy with him during his June 3 orientation. Huggins also admitted that the policy "might" have been posted on the bulletin boards throughout the facility. I credit the testimony of Gerald Nelson, who testified without contradiction, that the policy was posted near the break rooms and the time clock until at least December. Whether or not Huggins chose to read the attendance policy, he was given sufficient opportunity to familiarize himself with the policy. The policy states that Respondent will require documentation of authorized reasons for absence where appropriate. The last paragraph of the policy provides that if management has reason to suspect abuse in the case of absenteeism, the employee will be required to present satisfactory proof of the need for the employee's absence. The record demonstrates that prior to testifying at the Board proceeding, Huggins received a verbal warning on June 13 when he left work early to go to the doctor and failed to provide the required documentation. On June 25, he was again given a verbal warning when he called in sick and yet never provided a doctor's statement in support of his absence. The record further reflects that his tardiness on August 14 and his leaving work early on July 19 were both excused because Huggins provided either documentation or supporting information. Thus, the record is undisputed that prior to his protected activity, Huggins was disciplined for attendance infractions when he failed to provide documentation and he was excused for other potential infractions when he provided documentation.

The record evidence involving Huggins' September 4 warning is perhaps the most significant in analyzing Huggins' credibility as well as establishing the foundation of Respondent's affirmative defense. Primarily, it is the credible testimony of Cindy Arledge that is most compelling. Arledge credibly testified that she was the employee responsible for securing the documentation from employees to determine whether their absences were excused or unexcused under the May attendance policy. She testified that she was aware that she was sometimes viewed as the attendance policy police. Her testimony indicated that because she took great pride in her responsibility, she tried to consistently and conscientiously enforce the policy. Her testimony was visibly emotive as she described her attempts to talk with Huggins and to convince him that she needed a doctor's statement to document his absence on September 3. In contrast to Huggins¹⁴, Arledge's testimony was consistent throughout direct and cross-examination. Although Huggins initially denied having any conversation with Arledge during direct examination, he later testified on rebuttal with great detail about three separate

¹⁴ Huggins' admitted that while he stated in his June 3 Medical Questionnaire form that he had never received worker's compensation for work related injuries, he had in fact done so before working for Respondent. Huggins asserted that he completed the form incorrectly because he misread the form. While Respondent took no action against Huggins once it was discovered that he had falsified this pre-employment form, his admissions nonetheless indicate his possible predilection toward self-serving statements in lieu of total candor. While I have credited Huggins with respect to comments made to him by both Scott and Phelps, I nevertheless find that Huggins was less than candid in his testimony describing the circumstances of his discipline.

conversations with Arledge concerning his lack of documentation. He even contended on rebuttal that he apologized to her when he had been called into Scott's office to discuss his lack of documentation. Arledge testified that when Huggins met with Scott, he admitted that he only filled his prescription and had not actually seen a doctor. While Huggins denied this admission to Scott, he does not dispute that he failed to provide any documentation for this absence.

Huggins left work at 1:55 p.m. on September 12 because his wife was allegedly out of gas. Although Huggins produced a gas receipt showing the purchase of gas at 3:43 p.m., Arledge testified that Huggins had used this same excuse once or twice before. Arledge brought this matter to Scott's attention because she questioned whether this absence should be excused. Huggins' own testimony reflects that Arledge may have had a legitimate basis for questioning Huggins and his wife's repeated emergencies. He admitted that on August 30, he arranged for his wife to call him at work and report that she had an emergency in order that he could leave work early. While the record does not reflect that Arledge was aware of Huggins' fabrication on August 30, his admission lends credence to her suspicions.

Huggins does not deny that he did not report to work on August 27 as scheduled. While he told Respondent that he did so because he was having his car repaired, he reported to work on August 30 without any documentation of this repair. Huggins testified that he told Respondent that he could not provide documentation because he had not received his car from the repair shop. Huggins admitted that after receiving the earlier suspension, he was aware that he could be terminated for his next unexcused absence. Based upon his previous excused and unexcused absences, Huggins should have been fully aware of the necessity for documentation. Although he may not have had a final repair bill to submit, he apparently made no attempt to obtain any kind of documentation from the repair shop. The record does not reflect that he made any offer to get in touch with the repair shop or to provide anything in support of his absence on August 27.¹⁵

The record contains evidence of Respondent's animus toward the Union and specifically toward Huggins. While I have no doubt that Respondent was pleased that Huggins could be terminated under the attendance policy, the record supports that he would have been terminated in the absence of his protected activity. Based upon Respondent's past practice, Huggins was well aware of the significance of providing documentation in support of unscheduled absences. Huggins testified that on five to ten occasions, Respondent previously excused his absences after he submitted documentation and he does not deny that he was told that he was required to submit documentation. Despite this knowledge however, Huggins made no attempt to provide documentation of his absence on September 27. I do not find that Respondent treated Huggins

¹⁵ Gerald Nelson testified that at the end of August or the first of September, Huggins told him that he (Huggins) was going to make Jim Scott fire him and then file suit against him. Huggins suggested that he knew that Scott didn't like the Union. He predicted that the suit would be successful, as it would ride on the coattails of the other allegations against Respondent. It is likely that Nelson may have sought to present Huggins in the worst possible light because of his apparent disdain for Huggins. I note however, that while Huggins testified at least twice after Nelson, he did not deny Nelson's testimony concerning this alleged statement to Nelson. In crediting Nelson's testimony, the question certainly arises as to whether there were any other reasons that Huggins may not have been diligent in complying with the basic requirements of the attendance policy.

any differently than any other employee under the attendance policy. If anything, Respondent may have been more lenient with Huggins than other employees. In testifying about Respondent's treatment of Huggins, Scott recalled:

There was just one incident right after the other with Robert complaining, and like I said, we bent over backwards trying to - - I constantly kept in mind that Robert had testified against us and I felt that the opposing party would jump at an opportunity should I fire him for any reason, legitimate or not, that they would jump on an opportunity to take me back in court to get me to spend more money. And so for them to take us back into court that they would jump on the opportunity, so we was very, very careful about what we did with Mr. Huggins and trying to pacify him, but nothing we done could pacify Mr. Huggins.

By the time that Huggins testified in the Board proceeding on August 26, he had already received four verbal warnings under the attendance policy for leaving early, tardiness, failing to clock out and for an unexcused absence. Huggins received a verbal warning on June 13 when left work early to go to the doctor, but provided no documentation in support of the absence. On June 25, he called in sick but failed to provide a doctor's note. On July 2, he was given a verbal warning for tardiness and July 17, he received a verbal warning for failing to clock in after lunch. Respondent submitted records to show that from the time that the attendance policy was implemented in May and prior to October 28, Respondent issued 105 verbal warnings to other employees for infractions relating to absences, tardiness, leaving early or failure to clock in or out.

Respondent's records also reflect that prior to testifying in the Board proceeding on August 26, Huggins had already received three written warnings. He received a warning on July 8 after he was absent from work for reported car trouble. He received a warning on July 24 for tardiness and again on August 2 for failing to clock in after returning from lunch. Respondent's records also reflect that between May 9 and November 4, Respondent issued 53 written warnings to other employees for various attendance policy violations. On September 12, Huggins received the written warning for leaving work early because he reported that his wife was out of gas. Although Huggins submitted a gas ticket for the purchase of gas later that same day, his absence was unexcused. I credit the testimony of Cindy Arledge who testified that because she felt that Huggins' absences to attend to his wife's emergencies were excessive; she brought the matter to the attention of Scott. I note that employee F. Mask received a written warning on June 25 for an absence. The warning states that she requested permission to take off from work to take her husband for a doctor's appointment. Because such appointments were found to be excessive and because the employee was noted to take all day for such doctor's appointments, the absence was unexcused and she was issued the warning. Thus, it appears that regardless of documentation, Respondent has issued warnings to other employees when there was suspected abuse or excessive absences.

Huggins received a three-day suspension on September 4 for his absence on September 3 and his failure to provide a doctor's statement. Respondent's records reflect that between May 23 and October 16, Respondent issued suspensions to 25 other employees for attendance policy infractions. Respondent's Exhibit No. 6 reflects that two employees were given suspensions on July 23 and September 13 because they were absent without doctor's statements. Another

employee received a suspension on June 28 because he took off work for the entire day to go to the probation office. I also note that Gerald Nelson, the employee who testified in Respondent's behalf received a three-day suspension on September 7 because of his third time card discrepancy.

Respondent contends that Huggins was terminated because of his absence on September 27 and his failure to provide documentation. Respondent submitted records to show that between May 24 and September 5, five other employees were terminated pursuant to the attendance policy.

The overall evidence reflects that Huggins was terminated for his fourth unexcused absence and after receiving a verbal warning, a written warning and a suspension for previous unexcused absences. While Huggins testified that he had not read nor given notice to the attendance policy, he admitted that he was aware that his next unexcused absence could result in discharge. Prior to testifying in the August 26 Board proceeding, he had received discipline when he had failed to provide documentation of his absences and he had been excused when he had provided the required documentation. Respondent's records reflect that other employees were disciplined for the same offenses. Clearly, there is evidence of animus toward not only the Union but to Huggins specifically and I must conclude that Respondent may have welcomed the opportunity to terminate Huggins' employment. Admittedly, Scott was consciously aware of Huggins' Union activity and the risk of new charges being filed for any adverse treatment of Huggins. There is however, no evidence that Huggins was treated any differently than any other employee who violated the attendance policy.¹⁶ Accordingly, Respondent has demonstrated that it would not only have disciplined Huggins, but would also have terminated him under the attendance policy, even in the absence of any protected activity.¹⁷ In his brief, Counsel for the General Counsel argues that Respondent gave shifting reasons for Huggins' termination. At trial, Scott went into great detail outlining Huggins' attitude and continuing complaints. The disciplinary action reporting form that was generated at the time of Huggins' discharge reflects that he was terminated because his August 27th absence was his fourth unexcused absence and he produced no documentation in support of the absence. While it is apparent that Scott took the opportunity to describe Huggins in as negative a manner as possible, I don't find that Respondent actually provided shifting reasons for the discharge. Scott simply attempted to embellish an otherwise justifiable basis for Huggins' discharge. Accordingly, I shall dismiss complaint paragraphs 9(b), (c), and (e).

In accordance with my conclusions above, I make the following:

¹⁶ *Industrial Construction Services*, 323 NLRB 1037 (1997).

¹⁷ I also note that the record contains the un rebutted testimony of Gerald Nelson who recalled that Huggins predicted that he would cause Scott to fire him.

Conclusions of Law

1. Sunshine Piping, Inc., Respondent, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the U.S. & Canada, AFL-CIO, Local Number 366 is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1), (3), and (4) of the Act by its written warnings to Robert Huggins on August 26, 28, 30, and September 18, 2002.

4. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent did not violate the Act in the other ways as alleged in the complaint.

Remedy

Having found that the Respondent has violated Sections 8(a)(1), (3) and (4) of the Act, I shall recommend that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, I shall recommend that Respondent rescind the warnings given to Robert Huggins in August 26, 28, 30, and September 18, 2002.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁸

ORDER

The Respondent, Sunshine Piping, Inc., Cedar Grove, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Disciplining employees or otherwise discriminating against any employee for supporting United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the U.S. & Canada, AFL-CIO, Local 366 or any other union.

¹⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline, and within 3 days thereafter notify the Robert Huggins in writing that this has been done and that the discipline will not be used against him in any way.

(b) Within 14 days after service by the Region, post at its Panama City, Florida facility *copies* of the attached notice marked "Appendix."¹⁹ Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 26, 2002.

(c). Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C.

Margaret Brakebusch
Administrative Law Judge

¹⁹ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT discipline you or otherwise discriminate against any of you for supporting the United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the U.S. & Canada, AFL-CIO, Local Number 366 or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discipline of Robert Huggins on August 26, 28 and 30, 2002 and September 18, 2002, and **WE WILL**, within 3 days thereafter, notify him in writing that this has been done and that the discipline will not be used against him any way.

SUNSHINE PIPING, INC.

(Employer)

Dated _____ **By** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employer and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1515 Poydras Street, Room 610, New Orleans, LA 70112-3723
(504) 589-6378; Hours: 9 a.m. to 5:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

**THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE
DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY
ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR
COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE
REGIONAL OFFICE'S**

COMPLIANCE OFFICER, (504) 589-6389